

The Industry Association of Building and Property Inspectors in WA Inc – Inspect WA	
Title: 2023.2 Inspect WA Position Paper: Residential Property Access for Pre-Purchase Building Inspections	
Subject	Residential Property Access for Pre-Purchase Building Inspections
Association Position	See Below
Date Preparation Commenced	August 23
Final Approval by Committee and Release to Members	August 23
Why was the Paper Released	<p>In WA, Building Inspectors are engaged to undertake Pre-Purchase Building inspections. This inspection is often governed by the REIWA Pre Purchase Building Inspection Annexure. Often these Annexures provided unrealistic time frames for access to be obtained on target properties, inspections to be conducted and reports produced.</p> <p>Seller and Sellers Agents will often deny access to a property until Finance has been approved. For some time, Association members has questioned the ability of Sellers and Sellers Agents to deny access and or defer access until such time as Finance has been approved.</p> <p>This Position Paper provides clarity around this complex issue.</p>
Key References	<ul style="list-style-type: none"> • AS 4349.1 • REIWA Contract for Sale of land or Strata title by Offer and acceptance • REIWA Standard Pre-Purchase Inspection for Major Structural Defects • REIWA and the Law Society of Western Australia have

	released the 2022 Joint Form of General Conditions
Key Issues for Consideration	<ul style="list-style-type: none"> Refer public release document
Association Legal Review	This document was supported by a Legal Opinion provided by Matthew Ellis Director of MGB Legal Barristers and Solicitors on behalf of Inspect WA.

Disclaimer	This document is not intended to be Legal Advice. The document is only intended for Members of The Industry Association of Building and Property Inspectors in WA. Where appropriate, readers of the document should seek their own independently legal advice.
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Signed Chairman

The Industry Association of Building and Property Inspectors in WA – Inspect WA

August 23



Our Ref: ME:Insp108894
Your Ref:

14 August 2023

PRIVATE & CONFIDENTIAL

Inspect WA
C/- David Clark
Suite 4/10 Whipple Street
BALCATTA WA 6021

by email: secretary.inspectwa@gmail.com

Dear Sirs

BUILDING INSPECTION REPORT CLAUSE AND ACCESS TO THE PROPERTY

We refer to the above matter and thank you for request for us to review the position under the REIWA standard purchase inspection clause.

We understand an issue has arisen where some real estate agents refuse access to the property for a building inspection report to be obtained until finance approval has been obtained. Sometimes this results in unworkable times for obtaining the report.

We confirm we reviewed the annexure, and have undertaken review of the basic law around contractual interpretation.

The General Conditions of Sale of Land also apply to this contract.

The REIWA annexure contains at clause 2, an obligation for the buyer to serve a copy of the report by a certain date. That date is usually to be completed as part of contract negotiation.

Clause 3 then goes to state that if the buyer and seller agent or the seller and seller representative do not receive the report before that date the buyer will be deemed to waive the benefit of the annexure, and time is of the essence.

The REIWA annexure is somewhat unusual in that there is no express provision about allowing access to the property. However, there is an area of law regarding implication of terms into contracts which would appear to us to be applicable. *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 is generally regarded as a baseline decision of the courts in relation to implication of terms.

There are effectively five things that must be satisfied to ensure that the contract can contain an implied condition. These are as follows:

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Level 3, 68 St George's Terrace, Perth WA 6000
PO Box Z5208 St George's Terrace, Perth WA 6831
- T: +61 8 6104 0555 - F: +61 8 6104 0599 - E: info@mgblegal.com.au - W: www.mgblegal.com.au -
MGB Legal Pty Ltd trading as MGB Legal ABN 16 135 709 241

1. the term must be reasonable and equitable;
2. the term must be necessary to give the contract business efficacy;
3. must be so obvious it goes without saying;
4. it must be capable of clear expression; and
5. it must not contradict and expressed term in the contract.

Obviously, allowing access to the buyer to conduct an inspection is part of the buyer being able to obtain a written report on any major structural defects that is required at clause 1 of annexure A. Our view is that it is very clear that a term should be implied into the contract to allow inspection at a time chosen by the buyer based upon his need to appoint someone to carry out that instigation.

We understand it then becomes an issue as to the timing for that to take place. We cannot see anything in the annexure or the general conditions that restricts the time for inspection other than it must be carried out before the date which is referred to in clause 2 of the annexure. In our view, it is very simple and clear to state that the seller must grant access to the buyer upon reasonable request, for the purpose of the buyer's nominated consultant (as that term is defined at clause 9.2 annexure) to access the property so as to be able to carry out the inspection and prepare the required report.

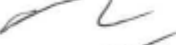
It is not possible for the wording in the contract to then try and imply a term that says that that right is somehow subject to other conditions being met. For example, a contract may be subject to a number of clauses including finance approval, pest inspection, obtaining records from Council so forth. These processes generally happen simultaneously, with the intent that they all be satisfied by a certain date. Unless the contract specifically says that one thing cannot happen until another one occurs, there is no basis for implication for a term to that effect. If one adopts the test from *Codelfa* noted above, it simply does not meet the test of being, for example, necessary to give the contract business efficacy or so obvious it goes withing saying.

Indeed, there is a strong argument that suggests that if the seller refuses to allow access to the buyer's nominated consultant at the time available for that consultant to carry out the report, so long as it is before the date for the provision of the report, then the Seller is actually acting in breach of the contract, and obviously consequences can flow from that breach.

Amongst the consequences could be an argument that suggests that the seller is no longer entitled to rely upon the provisions of clause 3 whereby the buyer is then deemed to have waived their rights under the clause. If the seller has by their conduct breached the contract so as to disable the buyer from carrying out the report, it is a basic provision of contract law that a party cannot benefit from their own breach. In those circumstances we would think again it would be reasonable and equitable to imply a term to suggest that the time for the delivery of the report be extended by the period of any refusal by the Seller or their agent to allow access, again for using the reasoning in *Codelfa* above.

We trust this is of some assistance. Please do not hesitate to contact our Matthew Ellis to discuss the matter further.

Yours faithfully



MGB LEGAL

Enc: 

Public Release



Public Release – Position Paper 2023.2 – August 2023

The Industry Association of Building and Property Inspectors in WA Inc – Inspect WA is pleased to announce the release of its Position Paper on: Residential Property Access for Pre-Purchase Building Inspections.

1 Background

There were several key issues that contributed to the release of this Position Paper:

- 1.1 Inspect WA members undertake thousands of pre purchase building inspections for WA residential property buyers every year.
- 1.2 Inspect WA members and their clients are often adversely impacted by the unrealistic delivery date for Pre-Purchase Building Inspections reports when Agents refuse to facilitate access to the target property until finance has been approved in writing, when Finance is condition of the Offer to Purchase Contract.
- 1.3 The default delivery period for Buyers Under Item 2. of the REIWA Australian Standard Pre-Purchase Inspector for Major Structural Defects Annexure to serve on the Seller a copy of the Building Inspection Report within 5 days of the Contract Date for the Latest Time for Finance Approval.
- 1.4 The challenge with the above is that several Sellers and or their Agents will not facilitate access to the target property until such time as written notification of finance approval has been received.

- 1.5 The challenges with the above are obvious. Once the Contract has been signed or Written Confirmation of finance approval issued the Buyer needs to coordinate access to the property between the Seller, Sellers Agent, Building Inspector and potentially a tenant or property manager, for a specific date and time. Post inspection the building inspector's reports needs to be produced, distributed to the Buyer, considered by the Buyer and the served on the Seller, or when authorised the Sellers Agent. Facilitating all the above can be challenging within 5 business and potentially represents an area of significant risk to the Buyer if the necessary arrangements for the inspection and report distribution cannot be facilitated within the required time frame.
- 1.6 The question has been raised, why does the Buyer have to wait until Finance approval to undertake the Pre purchase (and potentially the Pest Building) inspections?

2 Arguments for deferring the Pre-purchase building inspection

- 2.1 There have been several arguments put forward to support deferring the building inspection to post formal finance approval.
- 2.1.1 Undertaking building, pest and other inspections pre finance approval may be an unnecessary expense to the Buyer if finance is not approved. While this may be a valid issue in the minority of situations, Inspect WA suggest that the risks would be minimal given that:
1. Agents and Sellers are unlikely to accept Offers to purchase where the likelihood of securing finance is questionable.
 2. Buyers are unlikely to invest in building inspections where the prospects of finance approval are unlikely. However, we would contend that this is a decision of the Buyer and not a position imposed on the Buyer by the Seller or the Sellers Agent.
 3. Many Buyers have Pre-Approval for loan amounts stated in Contracts prior to entering Purchase Contracts.
- 2.1.2 Agents do not want to adversely impact the occupant of the property for the building inspections unless finance has been approved. Given the occupants have likely been impacted by home opens, inspections and valuations we think this argument carries limited weight.
- 2.1.3 Some Agents mistakenly believe that once Finance has been approved it cannot be "Unapproved" by the Lender prior to Settlement.

- 2.2 In Contrast to the Above Inspect WA believes Buyers should be afforded the opportunity to have their Building and Pest Inspections conducted on the property at the earliest possible opportunity, as envisaged by the Contract.

3 Can the Seller or their Agents deny access to a Pre-Purchase Building Inspection

1. Inspect WA is aware of several Sellers and or their Agents who refuse to provide reasonable access to properties to Buyers Building Inspectors until such time as the Seller or the Sellers Agents have been provided with written confirmation of Finance Approval. The Contract is often sighted as the ability to refuse access to the property.
2. Inspect WA was unable to find any specific clause in the REIWA Contract, REIWA Pre Purchase Building Inspection Annexure or Joint Form of General Conditions for the Sale of Land which enable the Seller or Sellers Agents to deny reasonable access to a property to enable the Pre-Purchase Building Inspection to be undertaken.
3. Given the above, Inspect WA sought independent Legal Advice on the ability for the Seller or Sellers Agent to deny access to a property to allow a Pre purchase Building inspection to be undertaken once a Contract of Sale had been established. This advice has confirmed that the general provision of the REIWA Contract documents do not provide any specific ability for the Seller or Sellers Agents to deny access to the Buyer (or their Inspector) upon a reasonable request.

4 Further Implications

- 4.1 The Legal advice further suggest that if a reasonable request to access the property is denied the Seller may be in breach of Contract such that the Sellers ability to rely on Cluse 3. of the REIWA Pre Purchase Building Inspection Annexure (I.e., the delivery date and time for the Pre-Purchase) Building Inspection report may be brought into question with flow on impacts.
- 4.2 Pre-Purchase Building Inspection reports will on occasion will identify Major Structural Defects which will enable the Buyer to invoke the REIWA Annexure. The REIWA Annexure then requires multiple steps to be undertaken including potentially the remediation of the identified Major Structural Defect. Given the remediation the Major Structural Defect has the potential to defer Settlement and hence impact multiple other Contracts it would appear sensible to have the Pre-Purchase Building inspection conduct as possible once the contract has been accepted by all parties.

- 4.3 Deferring Settlement has the potential to adversely impact both the Buyer and Seller where multiple settlements are planned for the same day.

5 Recommended Action

- 5.1 It is recommended that Buyers and their Building Inspectors undertake Pre purchase Building inspections as soon as Contract to purchase a property can be confirmed by all parties.
- 5.2 Where a Seller or Sellers Agents denies reasonable access to a property to enable a Buyers Building inspector to conduct a Pre-Purchase Building Inspection as no formal notification of Finance Approval has been provided it is recommended that:
1. The Buyer or Buyers Building Inspectors confirm with the Seller or Sellers Agent in writing that reasonable access has been denied by them for the purpose of conducting a Pre-Purchase Building Inspection pursuant to the Contract between the Seller and the Buyer as a direct result of Finance having not yet been approved.
 2. That the Seller or Sellers Agent advise in writing under what specific contractual term reasonable access is being denied.
 3. The Buyers seek independent legal advice.

Disclaimer

This document was considered accurate at the time of release. REIWA Contracts and Annexes are subject to constant change as is the general commercial environment. Inspect WA recommends readers to this document obtain independent Legal Advice for taking any Action.

Committee
Inspect WA
August 23